Supreme Court, U.S.
FILED
DEC 21 1999
CLERK

No. 99-723

IN THE
SUPREME COURT OF THE UNITED STATES

METRO COMMUNICATIONS COMPANY
and PETER SIAVRAKAS,
Petitioners,

v.

AMERITECH CORPORATION, and
AMERITECH MOBILE
COMMUNICATIONS, INC.
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SUPPLEMENTAL BRIEF IN OPPOSITION TO PETITIONER'S SUPPLEMENTAL BRIEF

KENNETH J. MCINTYRE
Counsel of Record

DICKINSON WRIGHT PLLC
500 WOODWARD AVENUE, SUITE 4000
DETROIT, MICHIGAN 48226
(313) 223-3500

Attorneys for Respondents

BECKER GALLAGHER LEGAL PUBLISHING, INC.,
CINCINNATI, OHIO 800-890-5001

QUESTIONS PRESENTED

1. Whether Petitioners' supplemental brief should be disregarded because Petitioners have filed it in violation of Rule 15 of the Rules of the Supreme Court of the United States.

2. Whether there is a conflict among the United States courts of appeal regarding their jurisdiction over cases in which a plaintiff, who asserted a single claim for relief under alternative legal theories, has received a judgment for all of the relief that it requested on some of its theories and voluntarily dismissed without prejudice the remaining mooted legal theories for which it can no longer obtain relief.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

ARGUMENT 3

I. PETITIONERS HAVE SUBMITTED THEIR SUPPLEMENTAL BRIEF IN VIOLATION OF RULE 15(8) OF THIS COURT'S RULES 3

II. THE CIRCUIT COURTS UNIFORMLY AGREE THAT THEY ALWAYS HAVE JURISDICTION UNDER 28 U.S.C. § 1291 TO HEAR AN APPEAL FROM A JUDGMENT THAT GRANTS A PLAINTIFF ALL OF THE RELIEF IT REQUESTED. . . . 4

CONCLUSION 11

TABLE OF AUTHORITIES

CASES:

Brown Shoe Co. v. United States,
370 U.S. 294, (1962) 5

Chappelle v. Beacon Communications Corp.,
84 F.3d 652 (2d Cir. 1996) 8

Chrysler Motors Corp. v. Thomas Auto Co., Inc.,
939 F.2d 538 (8th Cir. 1991) 7

Cook v. Rocky Mountain Bank Note Co.,
974 F.2d 147 (10th Cir. 1992) 8

Hicks v. NLO, Inc.,
825 F.2d 118 (6th Cir. 1987) 7

Production & Maintenance Employees' Local 504 v. Roadmaster Corp.,
954 F.2d 1397 (7th Cir. 1992) 5, 6

Ryan v. Occidental Petroleum Corp.,
577 F.2d 298 (5th Cir. 1978) 8, 10

Schoenfeld v. Babbit,
168 F.3d 1257 (11th Cir. 1999) 10, 11

State Treasurer v. Barry,
168 F.3d 8 (11th Cir. 1999) 10, 11

OTHER:

Employee Retirement Income Security Act (ERISA)
§ 204(g) and (h) 6

Fed. R. Civ. P. 41(a)(2) 7, 8, 10
Fed. R. Civ. P. 54(b) 8

28 U.S.C. § 1291 . . . . . *passim*

U.S. Supreme Court Rule 15(8) 3

Charles A. Wright *et al.*,
Federal Practice & Procedure, § 3914.8 7

STATEMENT OF THE CASE

Petitioners' statement of procedural history in their supplemental brief is a greatly abbreviated summary of the complex procedural history of this case, which creates an inaccurate and misleading context for their argument. This Supplemental Brief in Opposition summarily reiterates the prior proceedings to avoid any confusion created by Petitioners' supplemental brief.

As discussed in Respondents' Brief in Opposition, Petitioner Metro Communications Co. ("Metro") sold wireless cellular service as an agent for Respondent Ameritech Mobile Communications, Inc. ("Ameritech Mobile"), operating under a written agency agreement (the "Agreement"), which expired by its terms on December 31, 1993. After Ameritech Mobile informed Metro that it would not renew the Agreement, Metro nevertheless continued to solicit customers for Ameritech Mobile's cellular phone service, purporting to act as a so-called "sub-agent" for an authorized agent of Ameritech Mobile, without Ameritech Mobile's knowledge, approval or authority. During the course of this "sub-agency," Metro improperly used certain of Respondent's trademarks. Metro's conduct breached the express terms of the Agreement.

In 1994, Respondents sued Petitioners in the United States District Court for the Eastern District of Michigan to enjoin Metro's misconduct and to recover the lost profits and diminution of goodwill and business prospects caused by that misconduct. The complaint pleaded several counts, each of which described these injuries in terms of different legal theories, including contract law, federal trademark law, state trademark law, the common law of trademarks, federal unfair competition law, state consumer protection law and tort. The

complaint requested the following relief: (1) an injunction preventing Metro from acting as "sub-agent" for Ameritech Mobile and from doing anything to suggest an affiliation between Metro and either of the Respondents; (2) damages from Metro's conduct; (3) an accounting for Metro's profits during the relevant period, as a partial means of measuring damages; (4) an award of attorneys' fees, which was a contractual remedy under the Agreement; and (5) a declaratory judgment that Metro's post-agency conduct was illegal. *See* Appendix A to Petition at 3a (discussing the causes of action and claim for relief in the complaint).

In a series of rulings, the district court ruled in favor of Respondents on their causes of action under federal trademark law and unfair competition law and under Michigan contract law. It then granted an injunction, awarded damages in the amount of Metro's net profits and awarded attorneys' fees. *See id.* In 1997, after the district court awarded all of the requested relief, it entered a final judgment in which it also dismissed without prejudice the counts from Respondents' complaint on which it had not ruled. *See id.* Because Respondents had received all of the relief they sought in their complaint, the dismissed counts were, in fact, moot.

Petitioners appealed that judgment to the United States Court of Appeals for the Sixth Circuit. They never argued that the Sixth Circuit lacked jurisdiction to hear their appeal. In July 1999, the Sixth Circuit affirmed the judgment of the district court, and Petitioners moved for rehearing. That motion was denied. Appendix F to Petition at 39a. Petitioners then filed the petition in this case. In their petition, as in their Sixth Circuit arguments, they did not contend that the Sixth Circuit lacked jurisdiction. Oddly, Petitioners, for the first time in their supplemental brief here, now argue that no final order was entered below.

ARGUMENT

I. PETITIONERS HAVE SUBMITTED THEIR SUPPLEMENTAL BRIEF IN VIOLATION OF RULE 15(8) OF THIS COURT'S RULES.

Rule 15(8) of the Rules of the Supreme Court of the United States allows parties to file supplemental briefs regarding a petition for certiorari only if such briefs address cases, legislation, or other events that have occurred **after** the petition was filed. Rule 15(8) is not an instrument by which a party may make a new argument, even if it was forgotten or neglected at the time of the petition. In fact, the rule specifically prohibits such a method of argument.

Petitioners have flagrantly violated the rule. In their supplemental brief, they raise a new argument that does not rely on factual or legal developments occurring since the filing of their petition. Petitioners could have included this odd argument in their petition, but, for whatever reason, they did not. This Court's rules do not allow Petitioners to raise new issues or arguments through a supplemental brief. Therefore, Respondents respectfully request that this Court disregard Petitioners' supplemental brief.

II. THE CIRCUIT COURTS UNIFORMLY AGREE THAT THEY ALWAYS HAVE JURISDICTION UNDER 28 U.S.C. § 1291 TO HEAR AN APPEAL FROM A JUDGMENT THAT GRANTS A PLAINTIFF ALL OF THE RELIEF IT REQUESTED.

Aside from its procedural flaws, Petitioners' supplemental brief is unpersuasive because the issue it discusses is completely irrelevant to this case. Petitioners refer to an ostensible circuit split on the question whether a plaintiff, which loses some of its causes of action in an adverse partial summary judgment, may bring an interlocutory appeal in disguise by voluntarily dismissing its remaining causes of action without prejudice for the purpose of reviving them after the conclusion of its appeal. Even if this were a real issue, this case cannot be an instrument for resolving it. Here, Respondents — plaintiffs below — prevailed on a motion for partial summary judgment, won all of the relief that they requested, and then voluntarily dismissed their redundant, mooted legal theories without prejudice. There is no controversy among the federal courts on the question whether an appeal may be taken from a judgment that resolves all of the issues in the case and concludes all of the parties rights and liabilities. Such a judgment is the eptiome of a "final order," as defined for the purposes of 28 U.S.C. § 1291. If there is a question about how far **losing** plaintiffs may go in attempting to manufacture finality for an order granting partial summary judgment for defendants, such a question is simply not presented by this case.

The fundamental principle relevant to this case comes from § 1291, which provides that the Courts of Appeal have jurisdiction to hear appeals from "final orders." It is well-

settled that a final order in the district court is one that disposes of all of the rights and liabilities of the parties and leaves the district court with nothing left to do but execute the judgment. *See Brown Shoe Co. v. United States*, 370 U.S. 294, 306-08 (1962) (concluding that a judgment was final because "[e]very prayer for relief was passed upon").

An order is "final" for the purposes of § 1291 if it completely disposes of the plaintiff's claim by awarding a plaintiff all of the relief that it requested. *See id.* An order may award a plaintiff all of its requested relief without addressing each and every count of the complaint. As the Seventh Circuit has noted, "[d]ifferent theories of relief — that is, different legal characterizations of the same facts — are not separate claims." *Production & Maintenance Employees' Local 504 v. Roadmaster Corp.*, 954 F.2d 1397, 1402 (7th Cir. 1992). A plaintiff makes a single claim when it presents one request for relief on the basis of one set of facts, even if the plaintiff characterizes those facts in terms of different legal theories and describes those theories in separate counts. *See id.* Therefore, when a court awards all of the requested relief, it resolves the claim and concludes the action, even if it does not rule on all of the legal theories and allows the voluntary dismissal without prejudice of some of the counts reflecting those theories.[1]

For example, in *Local 504, supra*, plaintiffs alleged that the trustees of their pension plan had improperly amended

---

[1] Plaintiffs will usually have good reasons for not permanently renouncing their mooted causes of action in a dismissal with prejudice. In the event that an appellate court will reverse a partial summary judgment and remand the case for trial or, at least, further proceedings, the plaintiff may wish to reassert the theories on which the trial court did not rule.

it. They characterized this action as a violation of certain sections of the Employee Retirement Income Security Act ("ERISA") and, alternatively, as a breach of the common law of fiduciary duty, but they asked for a single form of relief. The district court granted summary judgment on the ERISA causes of action and, in a separate, later order, voluntarily dismissed the fiduciary duty cause of action without prejudice. The Seventh Circuit held that:

> A dismissal without prejudice is generally not final and appealable. . . . In this case, however, the district court's summary judgment on the § 204(g) and (h) [of ERISA] counts granted the plaintiffs all of the relief they had requested and were entitled to. As plaintiffs noted in the memorandum they filed in the district court supporting their motion to dismiss, trial on the two remaining claims would have been unnecessary. By dismissing the final two counts, the district court ended the litigation in that court.

Local 504, 954 F.2d at 1402 (citations omitted). Consequently, it is well-established and obvious that a district court issues a final order when it grants summary judgment to the plaintiff and awards all of the relief that the plaintiff requested, even if the summary judgment does not dispose all of the plaintiff's causes of action, and even if the unresolved causes of action are voluntarily dismissed without prejudice. The existence of the dismissed claims poses no threat of piecemeal litigation because the prevailing plaintiff could not file a new complaint on the basis of those claims because, having been afforded full relief, it could not possibly show injury, which would be a prerequisite for asserting a claim.

The cases that Petitioners discuss in their description of a circuit split are fundamentally different from cases like this one. The cases that Petitioners cite involve plaintiffs that received **adverse** judgments eliminating some of their causes of action. Those plaintiffs attempted to convert a partial judgment into a final one by employing Fed. R. Civ. P. 41(a)(2) to voluntarily dismiss their remaining causes of action without prejudice, even though those causes of action presented live issues that the district court could resolve. In this case, the causes of action that were voluntarily dismissed without prejudice were superfluous and moot, and they left nothing for the district court to resolve. Consequently, their dismissal does not reflect an attempt to "manufacture" finality.

Petitioners may be correct in arguing that there is a circuit split on the propriety of asserting appellate jurisdiction of cases in which a plaintiff has attempted to artificially convert an adverse, partial summary judgment into an order that meets the finality requirements of § 1291. *See* 15A Charles A. Wright *et al.*, Federal Practice & Procedure, § 3914.8 (discussing this kind of "manufactured" finality). As Petitioners suggest, when that type of procedural jockeying occurs (which did not happen here), there is some dispute among the Courts of Appeal about the propriety of such a procedure. *See id*; *compare Hicks v. NLO, Inc.*, 825 F.2d 118 (6th Cir. 1987) (holding that a partial summary judgment can be converted into a final order when a plaintiff voluntarily dismisses its remaining claims without prejudice, as long as the district court is not deceived about the reasons for and nature of the dismissal) *and Chrysler Motors Corp. v. Thomas Auto Co., Inc.*, 939 F.2d 538, 540 (8th Cir. 1991) (holding that, when a district court dismissed some causes of action without prejudice after granting partial summary judgment against the counter-plaintiff, "the effect of [the dismissal] was

to make the judgment granting partial summary judgment a final judgment for purposes of appeal, even though the district court had not so certified under Fed. R. Civ. P. 54(b)") *with Ryan v. Occidental Petroleum Corp.*, 577 F.2d 298 (5th Cir. 1978) (holding that a plaintiff could not employ a voluntary dismissal without prejudice to convert an adverse partial summary judgment to a final order for the purposes of § 1291) *and Cook v. Rocky Mountain Bank Note Co.*, 974 F.2d 147, 148 (10th Cir. 1992) ("A plaintiff cannot be allowed to undermine the requirements of Rule 54(b) by seeking voluntary dismissal [without prejudice] of her remaining claims and then appealing the claim that was dismissed with prejudice") *and Chappelle v. Beacon Communications Corp.*, 84 F.3d 652 (2d Cir. 1996) (same). These cases are, of course, irrelevant to what occurred in this action, where plaintiffs prevailed and a final judgment was entered.

In declining to allow losing plaintiffs to Rule 41(a)(2) as an instrument for manufacturing a final order, courts have noted that such a procedure creates a risk of piecemeal litigation. *See Chappelle, supra; Cook, supra*. If a plaintiff appeals an adverse judgment on some of the causes of action related to a single case and loses, it may revive the dismissed claims and bring a new suit, which might result in the resubmission of the case to the Court of Appeals. In such a situation, the appellate court might be forced to analyze the legal significance of the same facts in two different cases. *Chappelle*, 84 F.3d at 654. As the Second Circuit put it:

> A plaintiff's attempt to appeal a prior adverse determination following the dismissal of his remaining claims without prejudice necessarily implicates the policies of the final judgment rule. Allowing such an appeal following a voluntary dismissal with prejudice . . . furthers

> the goal of judicial economy by permitting a plaintiff to forego litigation on the dismissed claims while accepting the risk that if the appeal is unsuccessful, the litigation will end. By contrast, because a dismissal without prejudice does not preclude another action on the same claims, a plaintiff who is permitted to appeal following a voluntary dismissal without prejudice will have secured an otherwise unavailable interlocutory appeal.

Id. (citations omitted).

The same risk of piecemeal litigation is simply not present in a case such as this one where the prevailing plaintiff voluntarily dismissed certain redundant legal theories without prejudice after receiving a favorable judgment, which granted it complete relief on fewer than all causes of action, thereby mooting the alternative causes of action. In such cases, if the district court judgment is reversed or vacated, the case will be remanded to the district court, where, depending upon the procedural posture, the dismissed claims may or may not be reinstated. If they are reinstated, they will be part of the same case that was appealed, thus eliminating any threat of piecemeal litigation. If the district court judgment for the plaintiff is affirmed, the voluntarily dismissed claims will, of course, remain moot and cannot be the basis for any new suits.

If there were one rule for establishing appellate jurisdiction in all cases where a plaintiff voluntarily dismissed causes of action without prejudice, regardless of whether the plaintiff won or lost or whether it received complete relief, improper results would follow. Most importantly, the creation of a single rule would create a substantial opportunity

for plaintiffs to manipulate procedure for the purpose of precluding appellate review of judgments favorable to them.

The Eleventh Circuit has recently considered the problem of having one rule for all cases in which a plaintiff voluntarily dismisses causes of action without prejudice, and it has confirmed the importance of having different jurisdictional rules for winning and losing plaintiffs who employ Rule 41(a)(2) before an appeal is taken. In *State Treasurer v. Barry*, 168 F.3d 8 (11th Cir. 1999), the panel criticized the opinion in *Ryan* on the ground that *Ryan* could be interpreted to preclude appellate jurisdiction in **every** case where a plaintiff had voluntarily dismissed causes of action without prejudice, regardless of whether such plaintiff won or lost. The *Barry* court was concerned that the application of this rule to prevailing plaintiffs could allow such plaintiffs to effectively oust an appellate court of jurisdiction to overturn the judgment favorable to them. As the *Barry* court pointed out, a plaintiff could bring a complaint with two causes of action and one claim for relief, but one of the causes of action could be essentially meritless. Immediately after filing the complaint, and before the defendant could answer, the plaintiff could, of right, voluntarily dismiss the meritless cause of action and without prejudice and proceed with the viable cause of action. If it prevailed, the plaintiff could then rely on the theoretical pendency of the dismissed claim to bar the defendant from appealing the judgment. *Barry*, 168 F.3d at 19. Such a maneuver would, of course, be grotesquely unjust, and the Eleventh Circuit acted quickly to remove any indication that it would countenance such an injustice. In *Schoenfeld v. Babbit*, 168 F.3d 1257, 1266 (11th Cir. 1999), decided approximately two weeks after *Barry*, the court held that "we read *Ryan* and its progeny to apply **only** when a plaintiff voluntarily dismisses its remaining claims without

prejudice after a non-final **adverse** district court order has been entered" (emphasis added).

The Eleventh Circuit's discussion in *Schoenfeld* makes it clear that the circuit split identified by Petitioners has no relevance to this case. Indeed, if Petitioners succeeded in their attempt to apply an out-of-context rule to this case, they would create an unjust and improper procedural rule. While problems may arise when losing plaintiffs manufacture finality for adverse judgments, there is obviously no problem when an appellate court takes jurisdiction of a case after a plaintiff wins all of the relief to which it was entitled. As the *Barry* court noted, a problem would arise in this latter situation only if the defendant were prevented from taking an immediate appeal.

CONCLUSION

Petitioners' supplemental brief suffers from two fundamental flaws that make the brief both improper and nonsensical. First, the brief has been submitted in violation of the rules of this Court and should therefore be disregarded. Second, if this Court should consider the arguments in the brief, it will be clear that those arguments are simply inapplicable to this case. If they were to be applied here, they would create a perverse rule of appellate jurisdiction. Petitioners have identified a problem that relates to cases only in which a **losing** plaintiff manufactures finality for an adverse order. In this case, Respondents, as plaintiffs below, **prevailed** in every one of their claims for relief, and defendants appealed from the order that finalized the award. This order completely resolved all of the rights and liabilities of the parties and is therefore appealable under § 1291. If Petitioners' arguments were to be accepted by this Court, this case would lead to the creation of a rule that would encourage

plaintiffs to pair meritorious and meritless claims and then to voluntarily dismiss the meritless ones without prejudice as an artificial means of precluding appellate review in the event of their victory.

For the reasons noted above, and for those noted in Respondents' Brief in Opposition, this Court should deny the petition for a writ of certiorari.

Respectfully submitted,

/s/ _____

DICKINSON WRIGHT PLLC
Kenneth J. McIntyre
Counsel of Record
500 Woodward Avenue, Suite 4000
Detroit, MI 48226
(313) 223-3500
Attorneys for Respondents